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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

L.A. PRINTEX INDUSTRIES, INC.,  
Plaintiff,  
v.  
LE CHATEAU, INC., et al.,  
Defendants.

CV 10-4264 ODW (FMOx)  
*The Honorable Otis D. Wright II Presiding*

**OPPOSITION TO DEFENDANT'S  
SECOND MOTION FOR SUMMARY  
JUDGMENT; DECLARATION OF  
SCOTT A. BURROUGHS;  
DECLARATION OF JAE NAH**

Defendant's 2<sup>nd</sup> Motion for Summary  
Judgment

Date: May 23, 2011

Time: 1:30 p.m.

Courtroom: 11

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**THIS MOTION MUST BE DENIED**

There is no merit to this motion. It is the *second* summary judgment motion filed by Defendant, Le Chateau, Inc. (“LCI”) in an attempt to avoid liability for knocking off Plaintiff L.A. Printex Industries, Inc.’s (“PRINTEX”) proprietary textile design<sup>1</sup>. Tellingly, none of these motions argue that LCI didn’t sell infringing product; rather, they each attempt to avoid liability via a technicality<sup>2</sup>.

LCI does not argue the merits because on the merits it clearly loses. The evidence reveals that PRINTEX owns the design, and LCI did not create or obtain a license to use the design on the garments and the handbags at issue. It also shows that LCI submitted a perjurious declaration through which it denied selling handbags bearing the design at issue.

A review of the designs themselves reveals that the LCI product bears a near-verbatim knock-off of the PRINTEX design. Each and every element of the design on the LCI product is copied from the PRINTEX design and the designs employ the exact same color scheme.

There is no question that the design on the LCI garments and handbags was copied from the PRINTEX design. A review of the images makes this clear. Below, on the left, is the PRINTEX design. Below, on the right, is a close-up of the design on the LCI product. This comparison reflects the obvious copying:

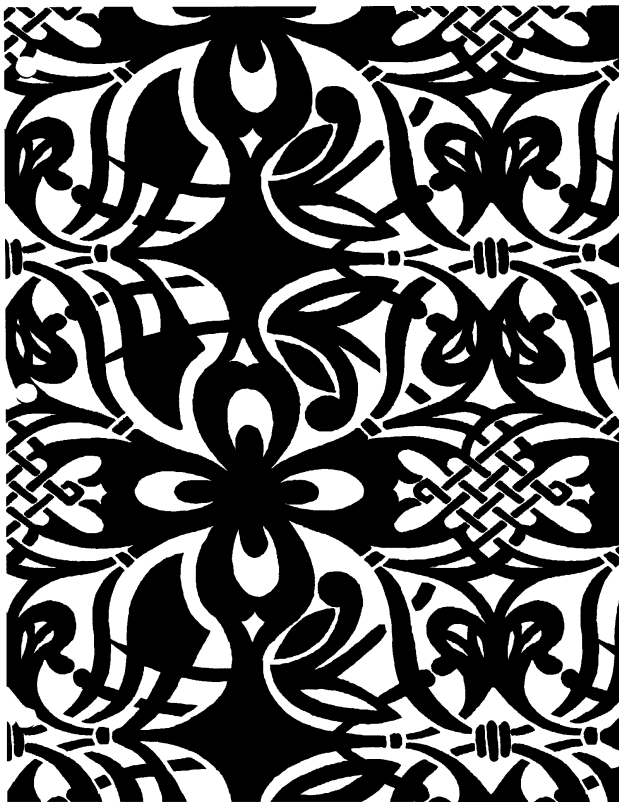
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<sup>1</sup> LCI also filed a Motion for Rule 11 sanctions based on the jurisdictional argument that it has now abandoned. This Motion was stricken by the Court as without basis.

<sup>2</sup> The meet and confer section of LCI’s motion is just plain wrong. LCI initially argued that its motion would be based on the District Court’s ruling in *United Fabrics v. C&J Wear*. We indicated that this ruling had been overturned by the 9<sup>th</sup> Circuit, and any motion based on the District Court’s ruling would be a violation of Rule 11. Despite this knowledge, LCI went forward with this motion. At no point did counsel to LCI call to meet and confer as required by L.R. 7-3, and he gives no reason why he violated that rule.

PRINTEX DESIGNLCI DESIGN

E50193.TIF



Cognizant of its clear liability, LCI has attempted to avoid accountability by filing technical and procedural challenges. LCI first motion argued that personal jurisdiction did not exist. After Plaintiff filed its opposition, LCI *abandoned* the personal jurisdiction argument – formally withdrawing it in its reply papers. In those same reply papers it then attempted to argue that it was not responsible for the infringing sales of its wholly-owned subsidiary, Chateau Stores. Because it is wholly improper to switch arguments in one’s reply papers, the Court found this motion to be withdrawn in its entirety.

Even if it hadn’t, the argument made by LCI in its reply papers is frivolous, as explained in full in PRINTEX’s supplemental briefing. See U.S.D.C. Dkt No. 44. Now, LCI has filed an additional meritless summary judgment motion. This

1 motion makes a hyper-technical argument regarding the validity of the copyright  
2 registration. Per recent 9<sup>th</sup> Circuit authority, this argument necessarily fails<sup>3</sup>.

### 3 STATEMENT OF FACTS

4 L.A. Printex discovered that LCI was selling garments and handbags bearing  
5 a knock-off of one of its fabric designs in the United States. Nah Decl. ¶2, Ex.1.  
6 Specifically, LCI was caught selling **three** different infringing products in its “Le  
7 Chateau” stores in New York – a handbag or tote, a dress, and a jacket. Id. Further  
8 investigation revealed that LCI was selling additional infringing product in the  
9 form of skirts and dresses online and in its stores in Canada. Id.

10 Eric Poulin, the Director of International Development for LCI, has  
11 submitted a declaration under the penalty of perjury that states under oath that LCI  
12 distributed and sold no more than 77 units of four models of *garments* bearing the  
13 design at issue. LCI Motion for Summary Judgment I, 3:19-20; Declaration of Eric  
14 Poulin, dated January 11, 2011; ¶¶4-5. U.S.D.C. Dkt. No. 22. This declaration is  
15 demonstrably false given that LCI *also sold handbags* bearing the design. In  
16 addition, Plaintiff has information indicating that LCI sold more than four different  
17 products bearing the knock-off print.

18 The graphic design at issue was and is owned by Plaintiff and registered  
19 with the U.S. Copyright Office. Nah Decl.¶3, Ex. 2. Plaintiff discovered that the  
20 garments and handbags at issue in this case (“Infringing Product”) had been  
21 manufactured by LCI in Canada, and then sold at LCI retail stores in Canada and  
22 the United States. Burroughs Decl. ¶2. Plaintiff also discovered that LCI had  
23 imported the Infringing Product – all of which bore a tag reading “le chateau” –  
24 into the United States in violation of 17 U.S.C. §602. Burroughs Decl. ¶3.

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25  
26 <sup>3</sup> In an attempt to mislead the Court, LCI refers repeatedly to a district court  
27 decision that has since been overruled by the 9<sup>th</sup> Circuit. This is in bad faith and a  
28 violation of Fed.R.Civ.P. 11.



1 LCI is a vertically integrated company, with a division that manufactures  
2 and imports the garments, and a division that sells these garments through retail  
3 stores. Burroughs Decl. ¶4. In this case, LCI eventually conceded that it had  
4 manufactured the Infringing Garments under the “le chateau” brand, labeled each  
5 garment with a “le chateau” tag, and then imported them into the United States. In  
6 the United States, it distributed the “le chateau” Infringing Garments to its “Le  
7 Chateau”-branded retail stores. Ex. 2. Its retail stores then sold the Infringing  
8 Garments to the public. Id.

9 As discussed herein, LCI violated the U.S. Copyright Act by importing the  
10 Infringing Product, and distributing same to its network of retail stores.  
11 Thereafter, LCI, and/or its affiliate, Chateau Stores<sup>4</sup>, violated the U.S. Copyright  
12 Act by selling the Infringing Garments to the public in stores operating under the  
13 name “Le Chateau.” As discussed in PRINTEX’s supplement briefing, LCI is also  
14 contributorily and vicariously liable for Chateau Stores’ sales of the Infringing  
15 Garments. U.S.D.C. Dkt. No. 44.

16 LCI conceded that it had imported and sold 77 garments in the United  
17 States; *viz.*, New York state. LCI Motion for Summary Judgment I, 3:19-20;  
18 Declaration of Eric Poulin, dated January 11, 2011; ¶¶4-5. This, it claimed, was the  
19 extent of Infringing Product sold by LCI in the United States. As is evident from  
20 Exhibit 1, LCI sold not only garments that infringed Plaintiff’s designs, but  
21 handbags as well. While LCI’s declaration under the penalty of perjury states that  
22 only 77 units were sold in the United States, those units are referred to as  
23 “garments.” This declaration is clearly false, as handbags were also sold by LCI in  
24 the U.S.

25  
26  
27 <sup>4</sup> LCI would be vicariously and contributorily liable for the sales by its wholly-  
28 owned subsidiary.



1 Further evidence of its falsity is the fact that no less than three different  
2 models of Infringing Product were sold by LCI, and the Poulin Declaration appears  
3 to address only one of those models. LCI apparently was of the belief that it could  
4 conceal its sales of these other products PRINTEX would be unable to unearth  
5 evidence of same. It was wrong.

6 Given this apparently fraudulent statement, and the dubious nature of the  
7 numbers provided, Plaintiff requested documents and evidence confirming the  
8 declared numbers and reflecting the party or source from which LCI obtained the  
9 design on the infringing garments. PRINTEX offered to resolve the case upon  
10 provision of these documents, and a written warranty relating to the sales numbers.

11 LCI refused to provide the documents to counsel in California, as these  
12 documents would have reflected the fraudulent nature of the declaration and the  
13 statement that only 77 units of Infringing Product were sold in the United States.  
14 To date, LCI has not produced a single document in discovery. Burroughs Decl.  
15 ¶5.

16 It also refused to identify its source for the design on the Infringing Product.  
17 Id. Though it is now making its second motion for summary judgment, it is still  
18 unwilling to make that representation.

19 In any event, despite the lack of cooperation in producing the documents,  
20 Plaintiff offered to resolve the case with LCI for \$3,000.00, which was far less than  
21 the cost of investigating this particular infringement. Burroughs Decl. ¶6. The  
22 agreement then broke down over the language of the confidentiality provision. Id.  
23 PRINTEX has since attempted to resolve the case with LCI, but LCI has indicated  
24 it will not settle unless PRINTEX pays LCI's attorneys' fees. Burroughs Decl. ¶7.  
25 Given the clear liability of LCI for copyright infringement, this position was not  
26 reasonable. Id. Ex., 3.

1 LCI has now filed a new motion attacking the validity of PRINTEX's  
2 registration. It does so without citing to a single piece of evidence, and provides  
3 only abject speculation and falsehoods in support of its position. The motion fails,  
4 as follows.

### 5 ARGUMENT

6 LCI's argument that PRINTEX's copyright is somehow invalid is wholly  
7 without merit. The entire motion is predicated on a gross misunderstanding of  
8 copyright law and the burden of proof in regard to challenging the validity of a  
9 copyright registration. Specifically, the motion repeatedly states that a copyright  
10 holder is responsible for proving, or presenting evidence of, the truth of the facts in  
11 the registration. See LCI Motion, pg. 1, lns. 4-6 ("plaintiff **must show** that the  
12 various works subject to the registration were in fact offered for sale *as a*  
13 *collection.*")(bold added, italics in original) and pg. 3, lns. 9-11 ("plaintiff has  
14 **failed to come forward with any evidence** that the textile design pattern subject  
15 to its collective copyright registration were published *as a collection*")(bold added,  
16 italics in original).

17 The opposite is actually true. *United Fabrics Int'l, Inc. v. C&J Wear, Inc.*,  
18 630 F.3d 1255, 1258 (9th Cir. 2011) (defendants' argument that plaintiff provided  
19 "no evidence" of validity of information in a copyright registration fails because  
20 the copyright registration provides a presumption of validity that must be rebutted  
21 by defendants). If a party challenging a registration's validity does not identify  
22 specific evidence to challenge that validity, its challenge must fail. *Id.* at 1257.  
23 (defendant's motion fails because "nowhere does it set forth facts that rebut the  
24 presumption of validity to which [plaintiff's] copyright is entitled."). A copy of the  
25 9<sup>th</sup> Circuit's Opinion is attached as Exhibit 4. Because LCI's motion suffers from  
26 this defect – indeed, it does not even attempt to cite to any evidence to rebut the  
27  
28

1 presumption, arguing instead that PRINTEX must prove that for which it has a  
 2 presumption – it must be denied.

3 1. 9<sup>th</sup> Cir. precedent requires a presumption of validity; this presumption  
 4 has not been rebutted

5 There is no question that the registration for the Subject Design is valid. LCI  
 6 argues that it is invalid because the works were not “published” together, but offers  
 7 not a single citation to any piece of evidence to support this naked assertion. This  
 8 is because no such evidence exists, and even if it did, it would not rebut the  
 9 registration’s presumption of validity because no fraud has been shown.

10 A certificate of registration made before or within five (5) years of first  
 11 publication of the registered work is prima facie evidence of the validity of the  
 12 copyright. 17 U.S.C. §410(c); *S.O.S., Inc. v. Payday, Inc.* 886 F.2d 1081, 1085  
 13 (9th Cir. 1989) (citing *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 908  
 14 (2d Cir. 1980)). It is also prima facie evidence of the validity of the facts stated in  
 15 the certificate, including ownership, and shifts the burden to defendants to offer  
 16 proof that these facts are false. 17 U.S.C. § 410(c); *Lamps Plus, Inc. v. Seattle*  
 17 *Lighting Fixture Co.*, 345 F.3d 1140, 1144-45 (9th Cir. 2003); see also *N. Coast*  
 18 *Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992) (“Under our  
 19 copyright law, the registration of the copyright certificate itself establishes a prima  
 20 facie presumption of the validity of the copyright in a judicial proceeding. . .”).

21 The information regarding publication that is set forth in a registration is  
 22 entitled to this presumption of validity. *R.F.M.A.S., Inc. v. Mimi So*, 619 F. Supp.  
 23 2d 39 (S.D.N.Y. 2009) (finding a single work registration for a group of  
 24 approximately eighty jewelry designs to be valid because plaintiff was “entitled to  
 25 a presumption of the copyright’s validity; this presumption includes the  
 26 preliminary determination by the Copyright Office that the [plaintiff’s] collection  
 27 was included in a single unit of publication.”); *Fonar Corp. v. Domenick*, 105 F.3d  
 28

1 99, 106 (2d Cir. 1997)) (“[W]e think that a presumption of regularity and  
2 appropriateness in filing is ordinarily subsumed in the presumption of validity that  
3 attaches to a certificate of copyright registration”).

4 This presumption requires the party challenging the registration prove that it  
5 is invalid *United Fabrics Int'l, Inc.*, 630 F.3d at 1258. (defendants’ argument that  
6 plaintiff provided “no evidence” of validity of information in a copyright  
7 registration fails because the copyright registration provides a presumption of  
8 validity that must be rebutted by defendants); see also *Hamil America Inc. v. GFI*,  
9 193 F.3d 92, 98 (2d Cir. 1999)(alleged infringer responsible for rebutting  
10 presumption). In this case, there is no probative evidence to rebut the presumption  
11 of Plaintiff’s ownership of a valid copyright.

12 To refute the validity of a copyright, the infringer must come forward with  
13 substantial evidence of fraud. It is settled law that “inadvertent mistakes on  
14 registration certificates do not invalidate a copyright and thus do not bar  
15 infringement actions, unless . . . the claimant intended to defraud the Copyright  
16 Office by making the misstatement.” *Urantia Found. v. Maaherra*, 114 F.3d 955,  
17 963 (9th Cir. 1997); accord *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486-  
18 87 (9th Cir. 2000); see also Nimmer, § 7.20 (absent fraud, “a misstatement or  
19 clerical error in the registration application . . . should neither invalidate the  
20 copyright nor render the registration certificate incapable of supporting the  
21 infringement action”). “A party seeking to establish a fraud on the Copyright  
22 Office, and thereby rebut the presumption of copyright validity, bears a heavy  
23 burden.” *Lennon v. Seaman*, 84 F. Supp. 2d 522, 525 (S.D.N.Y. 2000) (citing  
24 Nimmer, § 7.20[B]).

25 At most, and without any evidence, LCI alleges only that PRINTEX made  
26 an error in the registration. An error in the publication section of the registration, in  
27 the absence of fraud, will not invalidate the registration. *United Fabrics Int'l, Inc.*,  
28

630 F.3d at 1258 (rejecting argument that publication error is grounds for invalidating a registration, and stating that “[defendant] cites no authority that such facts rebut the presumption of copyright validity.”)<sup>5</sup>.

This is in accord with the authority. Courts have traditionally treated innocent errors contained in an application for a registration certificate with leniency. Nimmer, § 7.20[B], n.18. It is all but settled law that an inadvertent error, even if material, will never preclude a copyright infringement action where the work would have been accepted for registration if the application for the material contained a correct statement of facts. *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 668 n.5 (3rd Cir. 1990) (“that an inadvertent omission from a registration application will render a plaintiff’s copyright incapable of supporting an infringement action has not gained acceptance with the courts”); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161–62 (1st Cir. 1994) (“It is well established that immaterial, inadvertent, errors in an application for copyright registration do not jeopardize the validity of the registration”); *Eckes v. Card Price Update*, 736 F.2d 859, 861-62 (2d Cir. 1984) (“Only the ‘knowing failure to advise the Copyright Office of facts which might have occasioned a rejection of the application constitutes reason for holding the registration invalid’”) (quoting *Russ Berrie & Co., Inc. v. Jerry Elsner Co., Inc.*, 482 F. Supp. 980, 988 (D.C.N.Y. 1980)); Nimmer, § 7.20[B], n.19 (a misstatement in the registration

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<sup>5</sup> Also, in *Jedsen Engineering, Inc. v. Spirit Construction Services, Inc.*, 720 F. Supp. 2d 904 (S.D. Ohio 2010), the court refused to invalidate a registration on the basis of a putative error in the publication entry, finding the publication entry error was not a material misstatement, and would not affect validity. Similarly, the court in *Hearst Corp. v. Stark*, 639 F. Supp. 970, 974 (N.D. Cal. 1986) specifically rejected defendants’ challenge based on an incorrect publication date, because “[m]isstatements or errors in a registration application, unless by fraud, do not invalidate the copyright or render the registration certificate incapable of supporting an infringement action.” (citing 2 NIMMER ON COPYRIGHTS, § 7.20, 7-148.1 (1985)).

1 application does not “render the registration certificate incapable of supporting an  
2 infringement action”).

3 This doctrine of leniency in connection with registration formalities is so  
4 established that most well-known treatises in the field adopt it unequivocally.  
5 Nimmer, § 7.20[B] (“The courts generally have been most lenient . . . with respect  
6 to any innocent error contained in an application for a registration certificate”); 1  
7 Paul Goldstein, COPYRIGHT § 3.12.3, at 345 (1989) (“Courts have excused  
8 innocent errors or omissions affecting virtually every material aspect of a copyright  
9 registration application.”).

10 This axiom was recently affirmed in *Jules Jordan Video, Inc. v. 144942*  
11 *Canada Inc.*, 617 F.3d 1146, 1156 (9th Cir. 2010). In this case, the Ninth Circuit  
12 overturned a ruling invalidating the plaintiff’s registration. The District Court’s  
13 ruling was made, in part, on the grounds that the registration set forth the wrong  
14 name for the author of the work. In reversing, the Circuit called the ruling “legally  
15 erroneous, inequitable and illogical” because no party other than the plaintiff had  
16 the right to claim ownership to the works, and **no fraud** on the Copyright Office  
17 was established. *Id.* at 1156. This is true in this case, as well. No party other than  
18 PRINTEX claims ownership to the design, and there is no fraud.

19 Despite this clear doctrine, LCI argues –without citing to any evidence  
20 whatsoever (let alone evidence of fraud) – that PRINTEX’s copyright registration  
21 is invalid because the designs were not “published” together. Per *United Fabrics*  
22 and *Jules Jordan Video*, this motion must fail because (a) PRINTEX’s registration  
23 is presumed to be valid, (b) LCI has proffered no evidence to rebut that  
24 presumption, and (c) no evidence of fraud has been adduced.

## 25 2. *The Pro-IP Act requires a finding of validity*

26 If the firm position taken by this Circuit is not enough, in 2008 Congress  
27 passed the Prioritizing Resources and Organization for Intellectual Property Act  
28

1 (“PRO-IP Act”) in an effort to ensure that copyright infringement actions were not  
2 dismissed because of harmless technical issues with copyright registrations such as  
3 the putative issue alleged by LCI. 17 U.S.C. §411. This Act, in part, revised 17  
4 U.S.C. § 411 to preclude dismissal of infringement actions when minor errors  
5 existed in the registration. Specifically, it provides in relevant part that:

6 (1) A certificate of registration satisfies the requirements of this section and  
7 section 412, regardless of whether the certificate contains any inaccurate  
8 information, unless—

9 (A) the inaccurate information was included on the application  
10 for copyright registration with knowledge that it was inaccurate; **and**

11 (B) the inaccuracy of the information, if known, would have  
12 caused the Register of Copyrights to refuse registration.

13 (2) In any case in which inaccurate information described under paragraph  
14 (1) is alleged, the court shall request the Register of Copyrights to advise the court  
15 whether the inaccurate information, if known, would have caused the Register of  
16 Copyrights to refuse registration.

17 17 U.S.C. § 411(b) (emphasis added).

18 This test is conjunctive, requiring evidence of **both** (A) and (B). In this case,  
19 LCI has not produced any evidence that (A) PRINTEX knowingly included  
20 inaccurate information in the application or (B) that the inaccurate information  
21 would have caused the registration application to be refused. As such, per the  
22 above statute, LCI’s argument that the registration is invalid must fail.

23 In addition, where a party alleges that a copyright is invalid because its  
24 registration contains inaccurate information, and the Court is inclined to agree with  
25 this allegation, courts are required to verify the validity of a copyright with the  
26 Register before dismissing. 17 U.S.C. § 411(b)(2). In making that inquiry, a Court  
27 needs to elicit whether the inaccurate information would have caused the Register  
28



1 to refuse to certify the copyright had it been aware of the inaccuracy of the  
2 information. *Id.*

3 In this case, there is no evidence whatsoever that anyone other than Plaintiff  
4 owns the Subject Design, that Plaintiff knowingly included any inaccurate  
5 information on its registration, or that such information would have occasioned a  
6 rejection of the registration application. So owing, this motion must be denied.

7 3. *The Authorities Cited by LCI are Wholly Inapposite*

8 LCI, in support of its position, cites repeatedly to a District Court decision  
9 that has been expressly overruled by the 9<sup>th</sup> Circuit. This is in bad faith because it  
10 is a proffering of law that LCI knows to no longer be valid.

11 In the *United Fabrics v. C&J Wear* case, the defendants challenged the  
12 validity of the copyright registration at issue on the grounds that the group of  
13 designs in that registration were not “published” collectively. The District Court  
14 accepted this argument, and dismissed the case. On appeal, the 9<sup>th</sup> Circuit fully  
15 reversed the District Court, finding that:

16 The district court similarly ignored the statutory presumption of  
17 copyright validity when it reasoned that “[t]he burden to show  
18 standing is not a mere pleading requirement, but rather an  
19 indispensable part of the plaintiff’s case.” No cases were cited to us,  
20 and we are not aware of any authority, stating that the presumption of  
21 validity of a copyright does not apply when standing is at issue.  
22 Indeed, such cases do not exist because this rule would render 17  
23 U.S.C. § 410(c)’s presumption of copyright validity meaningless.

24 *United Fabrics Int’l, Inc.*, 630 F.3d at 1258

25 LCI also cites to the District Court’s decision in *L.A. Printex v. Aeropostale*.  
26 This case was decided *prior* to the 9<sup>th</sup> Circuit’s decision in the *United Fabrics Int’l*,  
27 *Inc.* appeal, and is also on appeal and expected to be reversed given the *United*  
28 *Fabrics Int’l, Inc.* holding on the issue.

1 In addition, the *Aeropostale* case is distinguishable because in that case  
 2 *Aeropostale* proffered concrete evidence in support of its position in the form of  
 3 deposition testimony. The Court found this evidence sufficient. LCI has offered to  
 4 this Court no such evidence.

5 4. *There was no discovery misconduct*

6 LCI argues that PRINTEX did not disclose every design covered by the  
 7 registration that covers the design at issue in this case<sup>6</sup>. The existence of other  
 8 designs is not relevant to this matter, and disclosing these designs would prejudice  
 9 PRINTEX given that LCI has already knocked off one of its designs.

10 Any argument regarding the validity of the copyright registration is  
 11 precluded by lack of any evidence of fraud, and PRINTEX would rather not  
 12 disclose a large number of its proprietary designs to a company that has already  
 13 exhibited a tendency to copy its designs<sup>7</sup>. This notwithstanding, PRINTEX  
 14 indicated to LCI that it would make the designs available for inspection.

15 In addition, LCI admits that it has now obtained from the Copyright Office  
 16 copies of the documents – the deposit copy and all designs submitted with the  
 17 registration – that it alleges PRINTEX has “withheld.”

18 Also, the “publication” of a copyrighted work occurs when a design is made  
 19 available to interested parties. *Brown v. Tabb*, 714 F.2d 1088, 1091-92 (11th  
 20 Cir.1983) (“general publication depends on the author making the work available  
 21 to those interested, and not on the number of people who actually express an  
 22

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23 <sup>6</sup> It later admits that it has received a copy of all of these designs from the  
 24 Copyright Office.

25 <sup>7</sup> The allegation that PRINTEX “sanitized” the registration is unfounded. LCI  
 26 Motion pg. 2, lns. 19-21. It is common knowledge in the copyright community that  
 27 approved copyright registrations are returned by the Copyright Office as **two-page**  
 28 **documents**, and these two-page documents do **not** include any images of the  
 works submitted. The three pages produced in discovery were the two-page  
 registration, and an image of the design at issue.

1 interest." ). At a design company, this would be the date that the designs are made  
 2 available for review in the showroom. Making the designs available in the  
 3 showroom is not recorded like a business transaction, so there are not necessarily  
 4 records reflecting the exhibition. As such, the best evidence of the publication date  
 5 is the date set forth on the copyright registration, which has been produced.

6 Moreover, LCI never provided a L.R. 37 letter detailing why it thought it  
 7 should have additional access to designs not at issue in the case. LCI also failed to  
 8 even make a phone call requesting the materials or attempting to meet and confer.  
 9 If it had, PRINTEX would have met and conferred in good faith in regard to this  
 10 issue.

11 5. *The “de minimis” argument is frivolous.*

12 LCI faultily argues that its copying was de minimis because it only copied  
 13 one of the designs in PRINTEX’s collection. This argument is valid only when the  
 14 copying at issue is of such a trivial extent as to fall below the quantitative threshold  
 15 of substantial similarity, which is always a required element of actionable copying.  
 16 See Nimmer § 13.03[A], at 13-27. This argument fails because the taking here is  
 17 more than trivial. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 US  
 18 539, 565 (1985), citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 56  
 19 (CA2), *cert. denied*, 298 U. S. 669 (1936) (“As Judge Learned Hand cogently  
 20 remarked, “no plagiarist can excuse the wrong by showing how much of his work  
 21 he did not pirate.”).

22 A brief review of the designs reveals that the **entire design** on LCI’s  
 23 Infringing Product was copied from PRINTEX’s design. Because LCI’s product  
 24 bears a design that has been copied in a near-verbatim manner, this argument must  
 25 be rejected. *Id.* (“[...] the fact that a substantial portion of the infringing work was  
 26 copied verbatim is evidence of the qualitative value of the copied material, both to  
 27 the originator and to the plagiarist who seeks to profit from marketing someone  
 28

1 else's copyrighted expression"). This is what we have here; the de minimis  
2 argument fails.

3 6. *Fees would not be appropriate because argument is not as to merits*

4 LCI also makes an argument that it should receive its attorneys' fees, though  
5 it is not clear why as a fees motion is only appropriate following an adjudication on  
6 the merits. In this case there has been no adjudication at all, and LCI is, at best,  
7 asking for an adjudication on a procedural issue – that the Court does not have  
8 subject matter jurisdiction. This is insufficient to award fees. See, e.g., *Buckhannon*  
9 *Board and Care Home, Inc. v. West Virginia Dept. of Health and Human*  
10 *Resources*, 532 U.S. 598 (2001).

11 **CONCLUSION**

12 LCI has come forward with no evidence to rebut the presumption of validity  
13 to which PRINTEX's copyright registration is entitled. All evidence reflects  
14 PRINTEX's ownership of a valid registration, and LCI's copying. This motion  
15 must be denied.

16 Respectfully submitted,

17  
18 Dated: May 2, 2011

By: /s/ Scott A. Burroughs  
Scott A. Burroughs, Esq.  
DONIGER / BURROUGHS  
Attorneys for Plaintiff  
L.A. Printex Industries, Inc.

**DECLARATION OF JAE NAH**

I, Jae Nah, declare that I am of the age of majority, have personal knowledge of the following, except for those matters stated on information and belief, and state that if called as a witness I could and would competently testify as follows:

1. I am the president of L.A. Printex Industries, Inc. (“L.A. Printex”), Plaintiff in this action. I have reviewed the documents and records relevant to this action, and I provide this Declaration from my personal knowledge.

2. L.A. Printex discovered that LCI was selling garments and handbags bearing a knock-off of one of its fabric designs in the United States. I have attached as Exhibit 1 a true and correct copy of an image of one such product. LCI was caught selling **three** different infringing products in its “Le Chateau” stores in New York – a handbag or tote, a dress, and a jacket. Further investigation revealed that LCI was selling additional infringing product in the form of skirts and dresses online and in its stores in Canada.

3. The graphic design at issue was and is owned by Plaintiff and registered with the U.S. Copyright Office. I have attached as Exhibit 2 a true and correct copy of the design.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed this 2<sup>nd</sup> day of May, 2011 at Vernon, California.

By: \_\_\_\_\_  
JAE NAH  
Declarant

**DECLARATION OF SCOTT A. BURROUGHS, ESQ.**

I, Scott A. Burroughs, Esq., declare that I am at least 18 years old and am competent to make the testimony set forth below. I am a shareholder at DONIGER / BURROUGHS APC, attorneys for Plaintiff in this action. I make this declaration in opposition to LCI's second summary judgment motion. If called as a witness I could and would competently testify as follows:

1. Our law firm represents L.A. Printex Industries, Inc. ("L.A. Printex") in this action.

2. We discovered that the garments and handbags at issue in this case ("Infringing Product") had been manufactured by LCI in Canada, and then sold at LCI retail stores in Canada and the United States.

3. Plaintiff also discovered that LCI had imported the Infringing Product – all of which bore a tag reading "le chateau" – into the United States in violation of 17 U.S.C. §602.

4. LCI is a vertically integrated company, with a division that manufactures and imports the garments, and a division that sells these garments through retail stores. In this case, LCI eventually conceded that it had manufactured the Infringing Garments under the "le chateau" brand, labeled each garment with a "le chateau" tag, and then imported them into the United States. In the United States, it distributed the "le chateau" Infringing Garments to its "Le Chateau"-branded retail stores. Its retail stores then sold the Infringing Garments to the public.

5. LCI refused to provide the documents to counsel in California, as these documents would have reflected the fraudulent nature of the declaration and the statement that only 77 units of Infringing Product were sold in the United States. To date, LCI has not produced a single document in discovery. It also continues to refuse to identify its source for the design on the Infringing Product.

1           It also refused to identify its source for the design on the Infringing Product.  
2 Id. Though it is now making its second motion for summary judgment, it is still  
3 unwilling to make that representation.

4           6.     In any event, despite the lack of cooperation in producing the  
5 documents, Plaintiff offered to resolve the case with LCI for \$3,000.00, which was  
6 far less than the cost of investigating this particular infringement. The agreement  
7 then broke down over the language of the confidentiality provision.

8           7.     We have since attempted to resolve the case with LCI, but LCI has  
9 indicated it will not settle unless PRINTEX pays LCI's attorneys' fees. Given the  
10 clear liability of LCI for copyright infringement, this position was not reasonable. I  
11 have attached as Exhibit 3 a true and correct copy of an email from opposing  
12 counsel reflecting this position.

13           8.     I have attached as Exhibit 4 a true and correct copy of the 9<sup>th</sup> Circuit's  
14 ruling in *United Fabrics Int'l, Inc. v. C&J Wear, Inc.*

15           I declare under penalty of perjury under the laws of the State of California  
16 and the United States of America that the foregoing is true and correct.

17           Executed this 2<sup>nd</sup> Day of May, 2011, at Culver City, California.

18                               By: /S/ Scott A. Burroughs  
19                                       Scott A. Burroughs, Esq.  
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